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CLERK US DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

BY RM DEPUTY

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

EDWARD SAENZ, Jr.,

Petitioner,

v.

UNKNOWN, Warden

Respondent.

Civil No. 08-0566 WQH (JMA)

**ORDER DISMISSING CASE  
WITHOUT PREJUDICE AND WITH  
LEAVE TO AMEND**

Petitioner, a state prisoner proceeding pro se, has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (West 2007).

**FAILURE TO SATISFY FILING FEE REQUIREMENT**

Petitioner has failed to pay the \$5.00 filing fee and has failed to move to proceed in forma pauperis. This Court cannot proceed until Petitioner has either paid the \$5.00 filing fee or qualified to proceed in forma pauperis. See Rule 3(a), 28 U.S.C. foll. § 2254.

**FAILURE TO USE PROPER FORM**

Additionally, a Petition for Writ of Habeas Corpus must be submitted in accordance with the Local Rules of the United States District Court for the Southern District of California. See Rule 2(c), 28 U.S.C. foll. § 2254. In order to comply with the Local Rules, the petition must be submitted upon a court-approved form and in accordance with the instructions approved by the Court. Presently, Petitioner has submitted an application for writ of habeas corpus on a non-approved form.

1 **FAILURE TO NAME PROPER RESPONDENT**

2 Further, review of the Petition reveals that Petitioner has failed to name a proper  
3 respondent. On federal habeas, a state prisoner must name the state officer having custody of  
4 him as the respondent. *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 894 (9th Cir. 1996) (citing Rule  
5 2(a), 28 U.S.C. foll. § 2254). Federal courts lack personal jurisdiction when a habeas petition  
6 fails to name a proper respondent. *See id.*

7 The warden is the typical respondent. However, “the rules following section 2254 do not  
8 specify the warden.” *Id.* “[T]he ‘state officer having custody’ may be ‘either the warden of the  
9 institution in which the petitioner is incarcerated . . . or the chief officer in charge of state penal  
10 institutions.’” *Id.* (quoting Rule 2(a), 28 U.S.C. foll. § 2254 advisory committee’s note). If “a  
11 petitioner is in custody due to the state action he is challenging, ‘[t]he named respondent shall  
12 be the state officer who has official custody of the petitioner (for example, the warden of the  
13 prison).’” *Id.* (quoting Rule 2, 28 U.S.C. foll. § 2254 advisory committee’s note).

14 A long standing rule in the Ninth Circuit holds “that a petitioner may not seek [a writ of]  
15 habeas corpus against the State under . . . [whose] authority . . . the petitioner is in custody. The  
16 actual person who is [the] custodian [of the petitioner] must be the respondent.” *Ashley v.*  
17 *Washington*, 394 F.2d 125, 126 (9th Cir. 1968). This requirement exists because a writ of  
18 habeas corpus acts upon the custodian of the state prisoner, the person who will produce “the  
19 body” if directed to do so by the Court. “Both the warden of a California prison and the Director  
20 of Corrections for California have the power to produce the prisoner.” *Ortiz-Sandoval*, 81 F.3d  
21 at 895.

22 Here, Petitioner has not named a Respondent. In order for this Court to entertain the  
23 Petition filed in this action, Petitioner must name the warden in charge of the state correctional  
24 facility in which Petitioner is presently confined or the Director of the California Department of  
25 Corrections. *Brittingham v. United States*, 982 F.2d 378, 379 (9th Cir. 1992) (per curiam).

26 **FAILURE TO ALLEGE EXHAUSTION OF STATE JUDICIAL REMEDIES**

27 In addition, habeas petitioners who wish to challenge either their state court conviction  
28 or the length of their confinement in state prison, must first exhaust state judicial remedies. 28

1 U.S.C. § 2254(b), (c); *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987). Ordinarily, to satisfy  
 2 the exhaustion requirement, a petitioner must “fairly present[] his federal claim to the highest  
 3 state court with jurisdiction to consider it . . . or . . . demonstrate[] that no state remedy remains  
 4 available. *Johnson v. Zenon*, 88 F.3d 828, 829 (9th Cir. 1996) (citing *Picard v. Connor*, 404  
 5 U.S. 270, 275 (1971); *Anderson v. Harless*, 459 U.S. 4, 6 (1982)). Moreover, to properly  
 6 exhaust state court remedies a petitioner must allege, in state court, how one or more of his or  
 7 her federal rights have been violated. For example, “[i]f a habeas petitioner wishes to claim that  
 8 an evidentiary ruling at a state court trial denied him [or her] the due process of law guaranteed  
 9 by the Fourteenth Amendment, he [or she] must say so, not only in federal court, but in state  
 10 court.” *See Duncan v. Henry*, 513 U.S. 364, 365-66 (1995)(emphasis added).

11 Nowhere on the Petition does Petitioner allege that he raised his claims in the California  
 12 Supreme Court. If Petitioner has raised his claims in the California Supreme Court he must so  
 13 specify.

14 Further, the Court cautions Petitioner that under the Antiterrorism and Effective Death  
 15 Penalty Act of 1996 (AEDPA) a one-year period of limitation shall apply to a petition for a writ  
 16 of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation  
 17 period shall run from the latest of:

18 (A) the date on which the judgment became final by the  
 19 conclusion of direct review or the expiration of the time for seeking  
 such review;

20 (B) the date on which the impediment to filing an application  
 21 created by State action in violation of the Constitution or laws of the  
 United States is removed, if the applicant was prevented from filing  
 by such State action;

22 (C) the date on which the constitutional right asserted was  
 23 initially recognized by the Supreme Court, if the right has been  
 24 newly recognized by the Supreme Court and made retroactively  
 applicable to cases on collateral review; or

25 (D) the date on which the factual predicate of the claim or  
 26 claims presented could have been discovered through the exercise  
 of due diligence.

27 28 U.S.C.A. § 2244(d)(1)(A)-(D) (West Supp. 2002).

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1 The statute of limitations does not run while a properly filed state habeas corpus petition  
 2 is pending. 28 U.S.C. § 2244(d)(2); *see Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999).  
 3 *But see Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’  
 4 when its delivery and acceptance [by the appropriate court officer for placement into the record]  
 5 are in compliance with the applicable laws and rules governing filings.”). However, absent some  
 6 other basis for tolling, the statute of limitations does run while a federal habeas petition is  
 7 pending. *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001).

8 Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal of a  
 9 habeas petition “[i]f it plainly appears from the face of the petition and any exhibits annexed to  
 10 it that the petitioner is not entitled to relief in the district court . . .” Rule 4, 28 U.S.C. foll.  
 11 § 2254. Here, it appears plain from the Petition that Petitioner is not presently entitled to federal  
 12 habeas relief because he has not alleged exhaustion of state court remedies.

### 13 **FAILURE TO STATE A COGNIZABLE FEDERAL CLAIM**

14 Moreover, in accordance with Rule 4 of the rules governing § 2254 cases, Petitioner has  
 15 failed to allege that his state court conviction or sentence violates the Constitution of the United  
 16 States.

17 Title 28, United States Code, § 2254(a), sets forth the following scope of review for  
 18 federal habeas corpus claims:

19 The Supreme Court, a Justice thereof, a circuit judge, or a district  
 20 court shall entertain an application for a writ of habeas corpus in  
 21 behalf of a person in custody pursuant to the judgment of a State  
 court only on the ground that he is in custody in violation of the  
 Constitution or laws or treaties of the United States.

22 28 U.S.C. § 2254(a) (emphasis added). *See Hernandez v. Ylst*, 930 F.2d 714, 719 (9th Cir.  
 23 1991); *Mannhalt v. Reed*, 847 F.2d 576, 579 (9th Cir. 1988); *Kealohapauole v. Shimoda*, 800  
 24 F.2d 1463, 1464-65 (9th Cir. 1986). Thus, to present a cognizable federal habeas corpus claim  
 25 under § 2254, a state prisoner must allege both that he is in custody pursuant to a “judgment of  
 26 a State court,” and that he is in custody in “violation of the Constitution or laws or treaties of the  
 27 United States.” *See* 28 U.S.C. § 2254(a).

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1 In his petition, Petitioner states as follows:

2 Thereby, request this Court to grant the petition for failure by lower Courts  
3 to follow the scope of the law on the merits presented beforehand, and in the  
4 furtherance of justice for the wrongs suffered by the indifference of the judicial  
5 system, thus allowing other the right passage of the Constitution and not him,  
6 creating a prejudicial mean.

7 (Pet. at 1.)

8 Later in the petition, Petitioner appears to argue that two California cases, *Hofsheier* and  
9 *Stow*, mandate that he should not have to register as a sex offender anymore. (Pet. at 2, 8.)  
10 However, in no way does Petitioner claim he is “in custody in violation of the Constitution or  
11 laws or treaties of the United States.” 28 U.S.C. § 2254.

#### 12 IN CUSTODY REQUIREMENT

13 Finally, it appears that Petitioner is not in the custody of the State of California, nor was  
14 he when he filed the Petition because Petitioner lists his address as “461 5th Ave. #20, San  
15 Diego, CA 92101.” Furthermore, Petitioner does not allege he was on parole or otherwise in  
16 constructive custody.

17 “Subject matter jurisdiction under the federal habeas corpus statute, 28 U.S.C. § 2254(a),  
18 is limited to those persons ‘in custody pursuant to the judgment of a State.’” *Brock v. Weston*,  
19 31 F.3d 887, 889 (9th Cir. 1994); *see also* 28 U.S.C. § 2241(c)(3). It is a jurisdictional  
20 requirement that, at the time a habeas petition is filed, “the habeas petitioner be ‘in custody’  
21 under the conviction or sentence under attack.” *Maleng v. Cook*, 490 U.S. 488, 490-91 (1989)  
22 (citing 28 U.S.C. §§ 2241(c)(3) & 2254(a)); *see Carafas v. LaVallee*, 391 U.S. 234, 238 (1968)).

23 Here, Petitioner may not challenge the constitutional validity of his sex offender  
24 registration requirement via a § 2254 petition because he is no longer in actual custody pursuant  
25 to that conviction and does not allege he was in constructive custody (e.g., parole or probation).  
26 *See Brock*, 31 F.3d at 889. “[O]nce the sentence imposed for a conviction has completely  
27 expired, the collateral consequences of that conviction are not themselves sufficient to render  
28 an individual ‘in custody’ for the purposes of a habeas attack upon it.” *Maleng*, 290 U.S. at 490;  
*see also Williamson v. Gregoire*, 151 F.3d 1180, 1183-84 (9th Cir. 1998) (stating that sex  
offender registration requirement does not satisfy § 2254’s custody requirement); *Zichko v.*

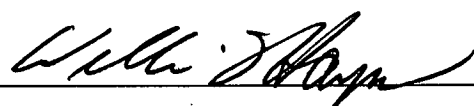
1 *Idaho*, 247 F.3d 1015, 1019 (9th Cir. 2001) (citing *Williamson* with approval); *see also McNab*  
2 *v. Kok*, 170 F.3d 1246 (9th Cir. 1999), *Henry v. Lungren*, 164 F.3d 1240 (9th Cir. 1999).

3 **CONCLUSION**

4 For the foregoing reasons, the Court **DISMISSES** this action without prejudice and with  
5 leave to amend. To have this case reopened, Petitioner must, **no later than June 9, 2008**: (1)  
6 pay the \$5.00 filing fee or submit adequate proof of his inability to pay the fee, **AND** (2) file a  
7 First Amended Petition that cures the pleading deficiencies set forth above. **THE CLERK OF**  
8 **COURT IS DIRECTED TO MAIL PETITIONER A BLANK MOTION TO PROCEED**  
9 **IN FORMA PAUPERIS FORM AND A BLANK FIRST AMENDED PETITION FORM.**

10 **IT IS SO ORDERED.**

11 DATED: 4/3/08

  
12 William Q. Hayes  
13 United States District Judge  
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